No. 76-1612

In the Supreme Court of the United States

OCTOBER TERM, 1977

HARRY U. SCRUGGS, SR. AND HARRY U. SCRUGGS, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 549 F. 2d 1097.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1977. A petition for rehearing was denied on April 18, 1977 (Pet. App. A35). The petition for a writ of certiorari was filed on May 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury that petitioners could be found guilty of violating 18 U.S.C. 2113(c) if, at any time during their possession of money stolen from a federally insured bank, they knew it had been stolen.

2. Whether the evidence was sufficient to support petitioners' convictions for having obstructed a criminal investigation, in violation of 18 U.S.C. 1510.

STATUTES INVOLVED

18 U.S.C. 2113(c) provides:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

18 U.S.C. 1510(a) provides:

> Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or
>
> Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted of having knowingly possessed, concealed, and disposed of money stolen from a federally insured bank, in violation of 18 U.S.C. 2113(c), and of having

willfully endeavored to obstruct, delay and prevent the communication of information by each other, and others, relating to a violation of 18 U.S.C. 2113, to criminal investigators, in violation of 18 U.S.C. 1510. Petitioner Harry U. Scruggs, Jr., was sentenced to concurrent terms of imprisonment for a year and a day on each count. Petitioner Harry U. Scruggs, Sr., was fined $1,000 ($500 on each count). The court of appeals affirmed (Pet. App. A1-A22).

On January 27, 1974, James Gardner was incarcerated in the County Jail for Shelby County, Tennessee, awaiting trial on several charges of armed robbery and related offenses (App. 18a).[1] Petitioners, who were attorneys in Memphis, Tennessee, communicated with Gardner at the jail and offered to represent him on the pending state charges. The evidence at trial, viewed most favorably to the government, showed that petitioners told Gardner that if Gardner could pay them $20,000, they would "beat [his] cases by hook or crook" (App. 19a). Gardner agreed to pay $10,000 in advance and $10,000 later, and, with the assistance of Scruggs, Jr., he was released on bail on January 31, 1974 (App. 19a-20a).

On February 11, 1974, at approximately 2:30 p.m., Gardner and an accomplice robbed a branch of the Memphis Bank and Trust Company of some $21,000 in cash (App. 20a). At 5:00 that evening Gardner went to petitioners' law office and gave them $6,000 from the proceeds of the robbery as a first payment on his bill (App. 21a-22a). The cash was still in Memphis Bank and Trust Company wrappers when Gardner delivered it to petitioners (App. 22a). Gardner, however, did not inform petitioners of the source of the money at that time (App.

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[1] "App." refers to the joint appendix filed in the court of appeals.

22a). Scruggs, Jr. gave Gardner a receipt for the money and put the cash in his desk drawer.

Gardner returned to petitioners' offices the next day, where he paid Scruggs, Sr. $3,000 more toward the fee. A bundle of ten consecutively numbered $100 bills taken in the robbery was included in the payment (App. 22a-23a). Scruggs, Sr. gave Gardner a second receipt (App. 23a).

On the morning of February 15, 1974, petitioners told Gardner that they had information that he had robbed the bank, and Gardner admitted to them that he had done so (App. 24a). At the request of Scruggs, Sr., Gardner then returned the receipts he had been given by petitioners (App. 28a). Gardner was arrested that afternoon and an FBI agent informed Scruggs, Jr. that Gardner had been charged with bank robbery (App. 101a).

Petitioners visited Gardner the next morning in jail. After he told them that the money he had paid them had come from the bank robbery, they said that they would have to wait a long time before spending it because it was probably bait money from the bank (App. 32a-33a).

A local attorney, Bruce Kramer, was appointed to represent Gardner on the bank robbery charge. Scruggs, Sr. told Gardner not to tell his new attorney about the payments made with the bank robbery proceeds because Scruggs, Sr. did not "trust" Kramer (App. 35a). Despite this advice, Gardner, on February 21, 1974, informed Kramer of the payments (App. 36a, 38a). Gardner also told Jerry Harris, an attorney who had previously represented him on other matters (App. 37a-38a).

Unsure of Gardner's truthfulness, and interested in returning the money to obtain leniency on the bank robbery charge, Kramer telephoned Scruggs, Jr. on February

21, 1974, and inquired as to his receipt of the payments from Gardner. Scruggs, Jr. denied having received any money from Gardner (App. 65a). On the next day, with Kramer's approval, Gardner confessed to the FBI, detailing his delivery of the bank robbery proceeds to petitioners (App. 57a). Later that day petitioners were jointly interviewed by two FBI agents concerning the stolen money; they again denied receiving any cash payments from Gardner (App. 81a-82a, 104a). Scruggs, Jr. made a similar denial to Jerry Harris (App. 116a-117a). Two days after their interview with the FBI, petitioners gathered the cash they had received from Gardner, and Scruggs, Jr. then allegedly burned it in his home fireplace (App. 196a-197a). Finally, on February 25, 1974, Scruggs, Sr. repeated to Kramer that he had not received the payments from Gardner (App. 70a).[2]

ARGUMENT

1. Petitioners contend (Pet. 6-7) that 18 U.S.C. 2113(c) does not make criminal the possession of money stolen from a bank if possession was acquired without knowledge that the money had been stolen, and the possessor became aware of its stolen character only subsequently. They contend that the district court therefore erred in instructing the jury that they could be found guilty if the jury determined that they had knowledge that the money

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[2]Petitioners' version of events differed in several respects from the government's evidence. They testified, for example, that on January 27 they only charged Gardner $10,000 for their services (App. 132a-133a, 161a). They also testified that on February 11 they received only $5,000 from Gardner and that the money was not in wrappers, although they acknowledged giving him a receipt for $6,000 (App. 136a). Petitioners acknowledged, moreover, that they became aware by February 16 that Gardner had been charged with a bank robbery on February 11 and that thereafter they had denied to FBI agents, and to Kramer and Harris, that they had received money from Gardner (App. 185a, 190a, 220a).

was stolen at any time during their possession of it. Petitioners claim that the statute would otherwise be unconstitutional, because it would deprive them of property without due process of law.

Petitioners' contention is groundless. Their argument relies on the doctrine that (unlike the situation with other property) persons who innocently acquire stolen negotiable instruments, including currency, for value may in some circumstances acquire valid title as against the victim of the theft and be permitted to retain the instrument. See, *e.g.*, *Ohio Casualty Ins. Co.* v. *Smith*, 297 F. 2d 265, 266 (C.A. 7). But, as the court of appeals correctly noted (Pet. App. A17), whatever the rule may be in other contexts, 18 U.S.C. 2113(c) has created a different rule with respect to the possession of money stolen from a federally insured bank with knowledge that the money was stolen.[3] The statutory proscription is clear, and makes it a crime to possess such money "knowing the same to have been taken from a bank * * * in violation of [18 U.S.C. 2113(b)] * * *," whether or not the possessor knew the money was stolen at the time he received it. *United States* v. *Koran*, 453 F. 2d 144, 146 (C.A. 10); cf. *United States* v. *Gaddis*, 424 U.S. 544.[4]

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[3]Petitioners did not object to the knowledge instruction on this ground at trial or seek to present their novel theory of defense to the jury. To the contrary, petitioners' counsel stated that he agreed with that portion of the charge in question, asking only that it be made clear to the jury that knowledge that the money was stolen must be shown during the time of concealment and also shown beyond a reasonable doubt (App. 266a-267a).

[4]Moreover, even if petitioners obtained title to the money they received from the robber, that fact is irrelevant to the question of their guilt under Section 2113(c). The actual currency taken in the robbery has significant evidentiary and investigatory value completely apart from its monetary worth. Thus, even if petitioners did have "title" to the money and were entitled to retain its value against the bank, they were not entitled to possess, conceal and dispose of the actual cash proceeds of the robbery, as they did, in contravention of the plain language of the statute. The cases cited by petitioners involving stolen bank money are not to the contrary. *Ohio Casualty Ins. Co.* v. *Smith*, *supra*, and *Transamerica Insurance Co.* v. *Long*, 318 F. Supp. 156 (W.D. Pa.), involved innocent recipients for value of stolen money who no longer possessed the actual cash when they learned of its illegal source and were subsequently sued by the banks' insurers. In *Kelley Kar Co.* v. *Maryland Casualty Co.*, 142 Cal. App. 2d 263, 264-265, 298 P. 2d 590, 592, a car dealer was awarded part of the actual cash stolen in a robbery against the claim of the bank's insurer, but only after the money had been turned over to the FBI and used in the investigation and prosecution of the robbery.

2. Petitioners also attack their obstruction conviction (Pet. 8-9) on the ground that there was insufficient evidence from which the jury could find that petitioners knew or had reason to believe that Kramer and Harris had information to furnish to criminal investigators. That claim is belied by the record. As previously noted, pp. 4-5, *supra*, the evidence showed that at least by February 16 petitioners were aware that Gardner had been arrested by the FBI for bank robbery; that when Kramer asked Scruggs, Jr. on February 21 about having received money from Gardner, he denied it; that both petitioners told FBI agents on February 22 that they had not received money from Gardner; and that thereafter petitioners made the same denial to Harris and again to Kramer. The evidence thus overwhelmingly supported the jury's conclusion that petitioners knew that the FBI was investigating the whereabouts of the money, knew that Kramer and Harris had some information about it, and thus "endeavor[ed] by means of * * * misrepresentation [to Kramer and Harris] * * * to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal

investigator," conduct proscribed by 18 U.S.C. 1510(a).[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1977.

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[5]Petitioners err in contending (Pet. 8-9) that the decision below conflicts with *United States* v. *Lippman*, 492 F. 2d 314 (C.A. 6), certiorari denied, 419 U.S. 1107, and *United States* v. *Williams*, 470 F. 2d 1339 (C.A. 8), certiorari denied, 411 U.S. 936. Those cases merely establish that to sustain a conviction under the statute an accused must have had reason to believe that the person to whom he made misrepresentations had information that he intended to furnish to a criminal investigator. The evidence here clearly satisfied that requirement.

*The Solicitor General is disqualified in this case.

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